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Nos. 07-984 and 07-990

In the Supreme Court of the United States

COEUR ALASKA, INC., PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

STATE OF ALASKA, PETITIONER

v.

SOUTHEAST ALASKA CONSERVATION COUNCIL, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL REPLY BRIEF FOR THE FEDERAL RESPONDENTS SUPPORTING PETITIONERS

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The government agrees with petitioner Coeur Alaska, Inc. (Coeur) and petitioner State of Alaska (Alaska) that, contrary to the premise of the questions on which this Court ordered supplemental briefing, new-source performance standards promulgated under Section 306 of the Clean Water Act (CWA), 33 U.S.C. 1316, do *not* apply to discharges of fill material. See Coeur Supp. Br. 7-9; Alaska Supp. Br. 10-13. As explained in our merits

briefs, that conclusion is compelled by the text of the CWA, and it is reinforced by the longstanding shared view of the Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps).

If the Court nevertheless holds that Section 306 standards do apply to discharges of fill material, the various briefs in this case suggest three possibilities as to the permitting process that might be used to determine whether a particular fill discharge satisfies an applicable performance standard. That determination might be made by the Corps pursuant to Section 404, 33 U.S.C. 1344; it might be made by EPA pursuant to Section 402, 33 U.S.C. 1342; or the CWA and implementing regulations might be read to provide that neither permitting agency will assess the consistency of a proposed fill discharge with applicable Section 306 standards.

Respondents Southeast Alaska Conservation Council, Sierra Club, and Lynn Canal Conservation (SEACC) contend that, even accepting the premise that the discharge at issue is "fill material" within the meaning of the CWA and applicable regulations, Section 402 is the proper permitting regime. That argument is foreclosed by the text of the CWA, which authorizes the Corps to issue permits for discharges of dredged or fill material and limits EPA's permitting authority to discharges of *other* pollutants, and by longstanding agency regulations confirming that Section 404 is the exclusive permitting regime for discharges of fill material. See Gov't Supp. Br. 13-14. Because Question 2 posed by the Court assumes a discharge that "satisfies the definition of fill material," SEACC's contention that EPA is the proper permitting agency cannot be reconciled with the pertinent statutory and regulatory provisions.

The logical consequence of arguments advanced in petitioners' supplemental briefs—that, even if Section 306 standards are held to apply to discharges of fill material, neither the Section 402 nor the Section 404 permitting process is available to consider whether a particular fill discharge satisfies those standards—is equally unsatisfying. The CWA establishes a permitting scheme under which a federal agency can determine, before a proposed discharge occurs, whether the discharge complies with all applicable CWA requirements. Under petitioners' approach, however, questions concerning a discharge's consistency with applicable performance standards would effectively be deferred until a subsequent citizen suit or EPA enforcement action is brought against the permittee. That approach would disserve the CWA's water-protective purpose, since an after-the-fact determination of illegality is less effective than a pre-discharge permit denial. See Gov't Supp. Br. 8. It also would disserve the interests of permittees, who would be subject to potential enforcement proceedings even though they were given no advance notice through the permitting process that their proposed fill discharges were illegal.

The only tenable conclusion is that, if Section 306 standards are held to apply to discharges of fill material, the Corps must take those standards into account in determining whether particular fill discharges will be permitted. That is consistent with this Court's interpretation of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A), as requiring agency decisions to comply with relevant statutory mandates (including *a fortiori* those contained in the Act that the agency is charged with administering) and with the agency's own regulations (which here require the Corps in issuing Section

404 permits to evaluate "compliance with applicable effluent limitations," 33 C.F.R. 320.4(d)). Accordingly, a Section 404 permit authorizing a discharge of fill material that would violate an applicable Section 306 standard and thus the CWA—as the Court hypothesizes in Question 1—would be subject to invalidation as agency action "not in accordance with law." 5 U.S.C. 706(2)(A).

1. If The Proposed Discharge Would Violate Section 306, The Section 404 Permits Are "Not In Accordance With Law"

The government agrees with SEACC that, if Section 306 standards are held to apply to discharges of fill material, so that the proposed discharge at issue here would violate Section 306, then the challenged Section 404 permits could be set aside as agency action "not in accordance with law." 5 U.S.C. 706(2)(A); see SEACC Supp. Br. 2-10. That conclusion follows from the assumed premise that the permits authorize discharges that would violate the CWA itself. See Gov't Supp. Br. 3-8.[1]

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[1] The government disagrees, however, with SEACC's conclusory contention that the Forest Service's Record of Decision (ROD) could also be set aside. Because the ROD applies the Forest Service's own regulatory criteria and makes clear that Coeur's entitlement to discharge fill material into protected waters within the National Forest System is contingent on the issuance of CWA permits by the Corps, invalidity of the Section 404 permits would not cast doubt on the legality of any decision that the Forest Service made or was required to make. See Gov't Supp. Br. 8-11. As a practical matter, however, if the Section 404 permits were set aside and Coeur decided to pursue an alternative disposal arrangement, the Forest Service might have to approve a new plan of operations (and hence issue a new ROD).

Petitioners' contrary conclusion rests on precedents that apply the APA (or other administrative-review provisions) to agency decisions made under very different circumstances. As explained in our supplemental brief (at 4-6), *PBGC* v. *LTV Corp.*, 496 U.S. 633 (1990) (*LTV*), is distinguishable on three separate grounds. First, the PBGC did not have any obligation to consider the "public interest" (*id.* at 646), whereas the Corps must do so in evaluating permit applications (33 C.F.R. 320.4(a)).[2] Second, the Court's question here assumes an actual statutory violation, not just an agency failure to consider the "policies and goals" that underlie a statute. *LTV*, 496 U.S. at 645. Third, and most importantly, the hypothetical violation at issue is of the very statute under which the Corps issues its Section 404 permitting decisions. Sections 301 and 306 are not provisions of a different statutory regime, let alone of an entirely different field of law, as was the case in *LTV*. *Id.* at 646.

The Court's decisions in *McLean Trucking Co.* v. *United States*, 321 U.S. 67 (1944), and *Community Television* v. *Gottfried*, 459 U.S. 498 (1983) (see Alaska Supp. Br. 5-6), are similarly distinguishable. In *McLean Trucking Co.*, the Court held that, although the Interstate Commerce Commission had a duty to consider the effect of a motor carrier merger on competition in determining whether the merger would serve overall transportation policy, it had no duty to apply the standards of the antitrust laws, which it lacked power to enforce. 321 U.S. at 79-80, 85-87. In *Community Television*, the Court held that, although the Federal Communications

[2] Alaska is therefore mistaken in asserting (Supp. Br. 7) that the Corps is not subject to broad public interest standards but is subject "only" to the specific standards of Section 404 and the Guidelines promulgated thereunder.

Commission could not ignore the needs of the hearing impaired in renewing television licenses, it had no duty to adjudicate alleged violations of the Rehabilitation Act of 1973, 29 U.S.C. 794, which it was never intended to enforce. 459 U.S. at 508-510. Unlike in *McLean Trucking* and *Community Television*, which involved independent statutory provisions that the agencies were not charged with administering, Section 306 is part and parcel of the very Act under which the Corps issues Section 404 permits.

Regulations governing the Section 404 permitting process specifically require the Corps to consider other environmental laws (40 C.F.R. 230.10) and, in particular, "compliance with applicable effluent limitations" (33 C.F.R. 320.4(d)), in determining whether permits for fill discharges should be issued. See Gov't Supp. Br. 5-7. To be sure, the agencies have not heretofore construed Section 320.4(d) to require consideration of performance standards promulgated under Section 306, since the agencies have not viewed those standards as "applicable" to discharges of fill material. But if this Court were to hold that Section 306 standards *do* apply to fill discharges, Section 320.4(d) by its plain terms would require the Corps to assess compliance with those standards in ruling on applications for Section 404 permits.

As SEACC points out (Supp. Br. 4-6), in the event of such a holding, the permits at issue here could be set aside for an additional reason as well. The Corps issued the Section 404 permits in this case on the rationale, consistent with EPA's construction of the CWA, that the proposed discharge of fill material was not subject to Section 306 standards. J.A. 342a ("This decision has been made in conformance with the USEPA memorandum, entitled 'Clean Water Act Regulation of Mine Tail-

ings,' dated May 17, 2004."); see J.A. 144a-145a ("[E]ffluent limitations guidelines and standards, such as those applicable to gold ore mining (see 40 C.F.R. Part 440, Subpart J), do not apply to the placement of tailings into the proposed impoundment.").[3] Because the Corps relied on a rationale that would be legally incorrect under the premise of Question 1, the permits at issue could be set aside on that basis alone if this Court concludes that fill discharges are subject to Section 306 standards. See *SEC* v. *Chenery*, 318 U.S. 80, 93-94 (1943); cf. *FEC* v. *Akins*, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case—even though the agency * * * might later, in the exercise of its lawful discretion, reach the same result for a different reason.").[4]

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[3] Petitioners argue that because the Corps relied on EPA's controlling interpretation as to the inapplicability of Section 306 standards to the proposed discharge, the Corps' decision should not be disturbed "[r]egardless of whether EPA's interpretation of its regulations was correct." Alaska Supp. Br. 8; see Coeur Supp. Br. 14-16. That argument lacks merit. By analogy, when a district court applies controlling circuit precedent, but the circuit precedent is overturned on appeal, the court of appeals ordinarily would reverse the district court's judgment even though the district court had acted pursuant to then-controlling law. Cf. *Rodriguez de Quijas* v. *Sharson/American Express, Inc.*, 490 U.S. 477, 484-485 (1989) (explaining that "the Court of Appeals should follow the [Supreme Court] case which directly controls," yet applying "the general rule of long standing * * * that the law announced in the Court's decision controls the case at bar" after overturning the previously controlling precedent).

[4] The government disagrees, however, with SEACC's additional argument (Supp. Br. 10) that the Corps' issuance of the Section 404 permits here impermissibly "trenches on EPA's authority." EPA expressed the view—not only in the government's briefs in this Court but also in the 2002 fill rule and the 2004 Mine Tailings Memorandum—that

In arguing that the Corps was not required to take Section 306 standards into account during the Section 404 permitting process, even assuming that those standards apply to discharges of fill material, petitioners do not identify any *alternative* mechanism for applying those standards to fill discharges like those at issue here. Petitioners correctly recognize that EPA lacks authority to issue permits for discharges of dredged or fill material. See Couer Supp. Br. 1-7; Alaska Supp. Br. 13-17. As discussed above (p. 3, *supra*), petitioners' position therefore logically implies that, even if Section 306 standards were held to apply to discharges of fill material, neither EPA nor the Corps would consider those standards in determining whether permits for such discharges should be issued. Such a gap in the permitting regime would be at odds with the basic design of the CWA, which establishes permits as the principal mode of compliance to ensure that the legality of a proposed discharge is assessed *before* the discharge occurs. And under petitioners' view, compliance with a valid permit would no longer shield the permittee from CWA liability. See Gov't Supp. Br. 7-8; SEACC Supp. Br. 11.[5]

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the proposed discharge should be regulated by the Corps under Section 404. See Gov't Reply Br. 11-22. As discussed in the government's supplemental brief (Supp. Br. 13-14) and in Part 2, *infra*, permitting authority over discharges of fill material rests with the Corps under Section 404, regardless of whether Section 306 standards apply to fill discharges.

[5] Because the Section 404 permits would not be "in accordance with law" if the proposed discharge would violate Section 306, the Court cannot simply uphold the Section 404 permits and reserve the question whether Section 306 standards actually apply. See Coeur Supp. Br. 9; Alaska Supp. Br. 3. As explained above, the two issues are inextricably intertwined.

2. A Discharger of Fill Material May Obtain a Section 404 Permit Only

All parties correctly agree that a discharger may obtain only one CWA permit for any proposed discharge. See Gov't Supp. Br. 11-14; SEACC Supp. Br. 12-13; Coeur Supp. Br. 1-7; Alaska Supp. Br. 13-17. SEACC, however, disagrees with the government and petitioners as to which permitting regime applies. Relying on the same arguments advanced in its merits brief, SEACC argues that, if Section 306 standards apply to fill discharges, permitting authority rests with EPA under Section 402 rather than with the Corps under Section 404. SEACC Supp. Br. 13-15. As explained in the government's prior briefs, that contention is foreclosed by the plain text of the CWA (see 33 U.S.C. 1342(a)(1), 1344(a)) and by the agencies' longstanding interpretations of the statutory scheme, which establish Section 404 as the exclusive permitting regime for discharges of fill material. See Gov't Br. 18-40; Gov't Reply Br. 4-5, 11-22; Gov't Supp. Br. 13-14. For those reasons, this Court should hold that a discharge of fill material may be permitted only under Section 404, regardless of whether Section 306 standards are deemed applicable.

* * * * *

For the foregoing reasons and those stated in our opening supplemental brief, Section 404 is the appropriate permitting regime for the proposed discharge of fill material at issue here, even if this Court were to hold that Section 306 standards apply to that discharge. Because the statutory and regulatory scheme contemplates that the Corps in issuing Section 404 permits will consider all applicable CWA provisions, a Section 404 permit for a discharge that violated the CWA, including Section 306, could properly be set aside as agency action "not in accordance with law." For the reasons stated in our original merits briefs, however, the Court should reject the premise of its supplemental questions, hold that Section 306 standards do not apply to the proposed discharge, and reverse the judgment of the court of appeals.

Respectfully submitted.

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